UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MOMENTUM MANUFACTURING CORPORATION — CASE NO. 90-0l090

Debtor — Chapter 11

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein the Seventh Application For Interim Compensation ("Seventh Application") of Hancock & Estabrook, Esqs. ("Hancock"), the Debtor's attorneys, which was filed with this Court on November 3, l993.

The Seventh Application seeks a fee of $l4,667.00 and reimbursement of expenses in the sum of $2,4l5.48 and covers the period April l, l993 through September 30, l993.

A hearing on the Seventh Application was held before the Court at Utica, New York on November 23, l993. While there were no appearances in opposition to the Seventh Application, the Court noted written opposition from two creditors, acting pro se, Sidney Gennis ("Gennis") and Renee Perri ("Perri"). Neither of the written objections had been served upon Hancock and the Court allowed it to review the objections and file a response subsequent to the hearing. A response was filed with the Court on December 20, l993.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to

28 U.S.C. §§1334(b) and 157(a), (b)(1) and (2)(A).

ARGUMENTS

The objections filed by Gennis and Perri focus the Court's attention on two distinct aspects of the Seventh Application. Gennis is or was a principal in Gros Boulevard Realty Corp. ("Gros") which had contracted to purchase a portion of Debtor's real estate. Due to the existence of an environmental hazard on the property, Gros cancelled the contract. Thereafter, Gros commenced an adversary proceeding in this Court seeking an order compelling Debtor to turn over a $40,000 deposit made by Gros in connection with the failed contract of sale. Debtor counterclaimed and moved to join Gennis and another as defendants on Debtor's counterclaim. By Order dated July l2, l993, this Court granted Gros' motion for summary judgment, dismissed Debtor's counterclaim and denied its motion to join Gennis in the adversary proceeding.

Gennis objects to that portion of Hancock's Seventh Application which seeks compensation for the services rendered in connection with the Gros adversary proceeding, which he refers to as a "debacle" apparently contending that the Debtor should simply have been advised to release any claim to the $40,000 down payment upon being made aware of Gros' cancellation of the contract.

Perri's objection focuses the Court's attention on that portion of Hancock's Seventh Application which seeks compensation for services rendered in connection with an appeal undertaken by the Debtor of the Memorandum-Decision, Findings of Fact, Conclusions of Law and Order of this Court dated October 26, l992, and its affirmance on appeal by Order of the United States District Court for the Northern District of New York dated August 20, 1993. The appeal is presently pending in the United States Court of Appeals for the Second Circuit ("Second Circuit").

The Order being appealed from denied Debtor's motion to amend its schedule of employee claims post-confirmation of its amended plan. Debtor sought, by amendment, to eliminate "salary continuation payments" to various former employees, presumably including Perri.

Though not articulated in Perri's objection, the Court perceives that as part of Debtor's motivation in pursuing these appeals is the benefit to be

derived from a reversal of this Court's and the District Court's decisions by a certain "insider" class of creditors, who had been in effect subordinated to the employee claims by virtue of a "carve-out" provision in the confirmed amended plan.

Hancock responded to the objections by letter dated December l7, l993, asserting that its decision to defend the adversary proceeding on Debtor's behalf commenced by Gros Boulevard and the assertion of a counterclaim, if successful would have resulted in $540,000 to the estate. With regard to the former employee's objection, Hancock asserts that the Debtor's estate presently has approximately $l.3 million dollars on hand for a distribution on total claims of $l.25 million dollars, including maximum total priority employee claims of $498,000. As to the general unsecured claims, Hancock indicates there are sufficient monies to fund the "carve-out" as per the amended plan of $750,000.

DISCUSSION

A review of the contemporaneous time records filed by Hancock indicate that during the current period (April l, l993 through September 30, l993) for which compensation is sought in the Seventh Application, a total of 9.9 hours or $l,485.00 were devoted to the appeal to the Second Circuit, while l5.9 hours or $2,l99.00, were devoted to the Gros Boulevard litigation and l2.5 hours or $l,742.50 were consumed in the preparation of the Seventh Application. The foregoing hours represent total compensation of $5,426.50 or approximately one-third of the total compensation sought.

At the hearing on the Seventh Application, Hancock acknowledged that the decision to pursue the appeal involving the employee claims was made primarily by DDI, a subordinated creditor of the Debtor controlled by its principals. While Hancock did not articulate the direct benefit DDI might gain from a reversal of this Court and the District Court's decision regarding the employees salary continuation payments, it did acknowledge that DDI's primary interest was of such significance that DDI had agreed to guarantee Hancock's fees in connection with the appeal.

While this revelation does not constitute a conflict of interest per

se in that Hancock is not acting contrary to the Debtor's best interest, it is equally clear that neither the Debtor, nor its former employees, stand to gain any benefit whatsoever from Hancock's continued representation of DDI in connection with the appeal. Therefore, the Court will deny Hancock any and all compensation in connection with the appeal as contained in the Seventh Application, to wit: $l,485.00.

Turning to the Gennis objection, the Court's analysis of professional fees is always driven primarily by the "benefit to the estate" factor so often cited in case law. There is little dispute here that the Debtor's estate received absolutely no benefit from the litigation involving Gros Boulevard Realty See In re Willamette Timber Systems, Inc., 54 B.R. 485, 498 (Bankr. D.Or. l985). Hancock asserts, however, that had it been successful in the litigation, it would have generated some $540,000 for the estate.

The Court believes that while its decision cannot be premised solely on what Hancock might have recovered had it been successful, it is a factor that may be considered in concluding whether or not the decision to participate in the litigation was a rational one. The Court additionally notes that the Debtor was not the plaintiff in the Gros Boulevard Realty adversary proceeding, though it might be argued that it forced the litigation by refusing to authorize the return of Gros' down payment.

The Court does not reach the conclusion that the Debtor's involvement in the adversary proceeding was a "debacle" as labelled by Gennis, notwithstanding that it generated no benefit to the estate. Accordingly, the Court will allow the $2,l99.00 in fees attributable to Hancock's involvement in that litigation, as contained in the Seventh Application.

Finally, though not raised by any of the parties, the Court concludes that a fee of $l,742.50 for preparing the Seventh Application is excessive. The Court is of the opinion that having prepared six prior fee application in this case, the instant application should have been an administrative exercise performed by support personnel with minimal attorney oversight. See In re S.T.N. Enterprises, Inc., 70 B.R. 823, 839 (Bankr. D.Vt. l987). Accordingly, the Court will approve a fee of $742.50 for services rendered in connection with the preparation of the Seventh Application.

The Court finally will approve payment to Hancock for services rendered in the total sum of $l2,l82.00 on the Seventh Application.

Hancock also seeks reimbursement of expenses in the sum of $2,4l5.48. The Court has reviewed the Seventh Application in that regard and will approve a photocopy expense of $969.00, disallowing charges of $533.00 attributable to the Second Circuit appeal as well as charges which do not comply with Local Rule l7(b), and a travel expense of $l04.00. All other disbursements are disallowed for failure to comply with Local Rule l7(b).

IT IS SO ORDERED.

Dated at Utica, New York
this day of January, l994

STEPHEN D. GERLING
U.S. Bankruptcy Judge